No. 89-542

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RUDY PERPICH, as Governor of the State of Minnesota, and THE STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III,

Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF IOWA, MAINE, MASSACHUSETTS, MONTANA OHIO AND VERMONT IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED

Given the provision in U.S. Const. art. I, § 8, cl. 16 "reserving to the States respectively . . . the Authority of training the Militia . . ." (emphasis added), may Congress authorize the federal executive branch to call the militia into active duty solely for training, without regard to a state's objection to the purpose, type, schedule or location of the training?

INTEREST OF THE AMICI CURIAE

The states identified above submit this brief amici curiae to urge the Court to hold that Congress may not, by enacting 10 U.S.C. § 672(f)(1988), withdraw authority from the states over the location, purpose, type or schedule of training the militia -- i.e. the National Guard. The amici are sovereign states that possess the authority over "training the [m]ilitia" that is

"reserv[ed] to the States" under the Federal Constitution. U.S. Const. art. I, § 8, cl. 16 ("the Militia Training Clause").[1/] The changes effected by 10 U.S.C. § 672(f) alter the balance of state and federal control over 54 national guards in all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam and the Virgin Islands.

The interest of the amici transcends any dispute over the location, purpose, type or schedule of particular National Guard training exercises. The amici seek to preserve the constitutional balance between the powers of the

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1/ "The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution." Maryland, for the use of Levin v. United States, 381 U.S. 41, 46, vacated and modified on other grounds, 382 U.S. 159 (1965) (emphasis added).

Federal Government and those of the states, as established by the framers of the Constitution. They seek to preserve the states' autonomy and their identities as independent repositories of sovereign authority within our federal system.

In particular, the amici view this case as an important test of the vitality of their reserved powers under the Militia Training Clause. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the states and the Federal Government and provide guidance to states who wish to exercise their powers in accordance with the framers' intent. This intent is already plainly expressed in the words of the Constitution, and has been subsequently reaffirmed by the courts

and respected by Congress until enactment of the legislation at issue in this litigation. See A-14 to 62 (Heaney, S.C.J. et al., dissenting).

STATEMENT OF THE CASE

The facts of this case involve solely the training of Minnesota National Guard members overseas. The amici rely upon Minnesota's statement of the case.

SUMMARY OF THE ARGUMENT

1. The historical purposes of the Militia Training Clause have been to allow the states to serve as checks and balances upon the federal use of the militia, and to preserve the democratic principles inherent in the concept of a militia, which consists of citizen-soldiers, in contrast to a federal army (pp. 8-16). Until 1986, Congress respected the states' authority

over training the National Guard in the absence of war or national emergency (pp. 28-33).

2. The federal orders in this case are expressly for the purpose of training the Minnesota National Guard. The National Guard is the modern militia reserved to the states. (p. 2, n.1). Accordingly, the orders violate principles of federalism and the express language of the Constitution "reserving to the States respectively . . . the Authority of training the Militia . . . ." (pp. 17-18).

3. The United States may not justify federal training of the National Guard by relying on the fact that National Guard members must also enlist in the National Guard of the United States (pp. 34-36). The federal government cannot train the militia

under the Armies Clause, U.S. Const., art. I, § 8, cl. 12, for to do so would destroy the contrast between the militia and the army in the face of the express reservation of militia training to the states (pp. 36-41). This would violate rules of constitutional construction and common sense by allowing a general clause to violate and vitiate the more specific Militia Training Clause (pp. 38-40). Nor can the United States claim that the National Guard of the United States is something other than militia (pp. 41-48).

4. Title 10 U.S.C. § 672(f), the "Montgomery Amendment," does not fall within Congress' power to prescribe discipline for training conducted by the states (pp. 48-51). It prescribes that training be done by the federal

government, not the states (p. 49). In fact, it does not prescribe any discipline, but simply purports to withdraw power from the states (p. 50).

5. Policy concerns expressed by the District Court and the United States are exaggerated and irrelevant (pp. 51-56). The federal government has ample authority to use the National Guard for operational missions, as opposed to training (pp. 53-54).

6. Even if the Court does not invalidate 10 U.S.C. § 672(f), it should construe the statute so as to avoid serious constitutional doubts (pp. 56-59). The statute therefore must be construed as continuing the requirement that, if the federal government wishes to train the militia, it must declare a national exigency (pp. 59-62).

ARGUMENT

The decision below renders meaningless the Militia Training Clause's express limitation on federal legislative power over training the militia. The Eighth Circuit's reasoning allows Congress to usurp the powers reserved to the States under that clause simply by claiming to act under the Armies Clause and passing legislation in the ordinary course. See A-5 to 13. The Armies Clause does not authorize such an easy evasion of the express limitations upon Congress' authority over militia training.

A. The Militia Clause Preserves Our System of Federalism.

The militia is a hybrid organization, subject to both state and federal control. United States v.

Miller, 307 U.S. 174, 178-179 (1939). The Militia Clause itself created this hybrid, by balancing federal wartime control over the militia with state authority over, among other things, militia training. The Clause is a significant part of the checks and balances of the Federal Constitution.

"The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government. See e.g. The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961)." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238-239, n.2 (1985). The states' role as "counterpoise" is not a mere formality, as the Montgomery

Amendment would suggest, but furthers basic Constitutional goals.[2/]

The balance of federal and state powers struck by the Militia Clause serves the fundamental purpose of preserving democratic principles. In the words of the framers, state control over militia training promotes responsiveness to "the local genius of the people" which the federal government could not accommodate adequately.[3/] Like other provisions of the Constitution, the Militia Clause reflects the "due regard for the presuppositions of our embracing

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2/ "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." Id. (emphasis added).

3/ The Records of the Federal Convention of 1787, Vol. II (Yale University Press, 1911) (Farrand, ed.), p. 331 (remarks of Delegate Ellsworth) (hereinafter "Farrand").

federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy. . . ." See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (emphasis added) (construing Supremacy Clause). See also City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 643 (1973) (Rhenquist, J., dissenting); Note, The Militia Clauses, The National Guard and Federalism: A Constitutional Tug of War, 57 Geo. Wash. L. Rev., 328, 349 (1989).

The states' control over the militia serves as a check upon the abuses of federal power feared by the framers. In response to the opponents of the proposed constitution, who feared the concentration of power in a national government and the destruction of state sovereignty, the Federalists relied upon

the state governments, as alternative sources of authority and objects of loyalty, to curb any tendency of the national government toward unresponsiveness, excessive centralization and tyranny. The Federalist No. 17, (A. Hamilton), No. 46 (J. Madison). There is no doubt that state control over the militia was an integral part of the framers' planned structure as a means of securing the blessings of liberty won in the war of independence: "[W]henever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia in order to raise an army upon their ruins." H.R. Debates on Amendments to the Constitution (August 17, 1789) (remarks of Representative Gerry), reprinted in 1 Gales & Seaton, Debates and Proceedings in the Congress of the United States (1834). To avoid such abuses, the states were to retain "a preponderating

influence over the militia." The Federalist No. 29 (A. Hamilton) (Mentor ed.), p. 186.

Without state control, protected against Congressional abrogation, it is impossible to achieve the pro-democratic purposes of the Militia Training Clause. Cf. Miller, supra at 178-179. For the powers reposed in the central government to be effectively cabined, the states themselves must remain strong both to serve as effective checks upon the central government and to nurture the democratic spirit. To remain strong, the states must retain the confidence and affection of their citizens. This they cannot do except as they remain accountable, effective instruments of self-government.

Even without an express grant of reserved power to the states, this Court has invalidated federal legislation that infringes upon the states' implied powers. See Lane County v. Oregon, 74

U.S. (7 Wall.) 71 (1869) (state taxing power); Coyle v. Smith, 221 U.S. 559, 565 (1911) (Congress may not prescribe location of a state's capital); Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315 (1935) (conversion of quasi-public state savings and loan associations into federal associations contravenes the reserved powers of the states).

A law that treats a state inconsistently with its "constitutionally recognized independent status" is void "because it would be contrary to the structural assumptions and the tacit postulates of the Constitution as a whole." Tribe, American Constitutional Law, § 5-20, p. 379, and n.6 (2nd Ed. 1989). The various provisions of the Constitution are to be construed harmoniously with

the States' reserved powers. See Fry v. United States, 421 U.S. 542, 547, n.7 (1975).

Yet, the Eighth Circuit's holding -- that the militia may be federalized for purposes of training -- would impair the states' sovereignty by destroying the constitutional "contrast" between "the Militia which the States are expected to maintain and train" and the "troops which they were forbidden to keep without consent of Congress." See Miller, supra, 307 U.S. at 178-179 (emphasis added) (Interpreting the Second Amendment in light of the Militia Clause).[4/] The intrusion into state sovereignty, attempted by Congress and

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4/ See also Selective Draft Cases, 245 U.S. 366, 387 (1918) (referring to the National Guard as "the organized body of militia within the States, as trained by the States under the direction of Congress . . .").

upheld by the Eighth Circuit, should not be countenanced.[5/]

B. The Text, Structure, History and Purpose of the Constitution Reflect Federalism By Reserving Authority Over the Training of the National Guard to the States.

The states' authority over militia training is confirmed by every conceivable source of constitutional interpretation: the text of the Militia Training Clause, the structure of the Constitution, basic principles of Constitutional interpretation, other

5/ In addition, the Eighth Circuit's holding that the federal government may train the militia vitiates the constitutional requirement that the President declare an exigency prior to assuming control over the militia. This requirement, though easily met if the President chooses to do so, serves the important purpose of informing the citizenry of the federal government's true purposes. In eliminating the requirement, 10 U.S.C. § 672(f) once again undermines democracy by reducing the accountability of the federal government to the people.

provisions of the Constitution (especially the Second Amendment), the Constitutional debates, Congressional understandings from 1787 through 1986, judicial decisions, as well as the general principles of federalism just discussed.

1. The Clear Text of the Constitution Protects the States' Powers over Militia Training from Federal Legislative Encroachment.

While most powers of the states are not enumerated expressly in the United States Constitution,[6/] the Constitution could hardly be more explicit in setting forth the separate roles of the federal and state governments with respect to the militia. The language and structure of the Constitution unequivocally demonstrate that the states, not the federal government, possess the

6/ See Tribe, American Constitutional Law, supra, § 5-20, pp. 378-379.

power over militia training. See The Militia Clause, Geo. Wash. L. Rev., supra, at pp. 346-357.

The Constitution defines the states' authority over the militia, in part, in its express language "... reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia ..." U.S. Const., art. I, Section 8, Clause 16.[7/]

The clear language of this clause simultaneously establishes a limitation on Congress and provides for the

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7/ U.S. Const., art. I, § 8, clause 16 provides:

> The Congress shall have power . . .
>
> [16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline Prescribed by Congress. . . .

exclusivity of the states' authority over training. See Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).[8/]

By placing this language in Article I, which delineates Congress' powers, the Constitution expressly preserves the states' powers as against federal legislation. The only permissible federal legislation regarding training the militia would prescribe discipline,

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8/ In upholding the Regents' order that University of California students complete a military science course, the Court stated:

> "So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government, and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of the ends." Id. at 260, (emphasis added) citing, inter alia, the Second Amendment and Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-17.

which is not involved here. See below, pp. 48-51. Congress therefore cannot exercise or legislatively alter the authority of training the National Guard.

Indeed, if the Congress can authorize a call into federal service for training, the Militia Training Clause becomes useless. Under the Federal Government's view, adopted by the Eighth Circuit, a simple majority vote of Congress can authorize the federal executive to exercise the authority of training the militia. The Constitution should not be interpreted as having any meaningless clauses. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

In short, the Militia Training Clause must, contrary to the ruling below, grant the states the authority of training the militia notwithstanding

federal legislative attempts to transfer that authority to the federal executive branch.

2. The History of the Militia Clause Demonstrates That the Purpose of the Clause is to Limit Federal Control over the Training of the Militia.

The debates over the Militia Clause reflected the delegates' concerns to preserve state authority in order to retain the responsiveness of the militia, as a citizen army, to the States and, thereby, to the will of the people.

These principles were articulated early in the debates over the Militia Clause:

> [Delegate Ellsworth] The whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power. He thought the Genl Authority could not sufficiently pervade the Union for such a purpose, nor could it

accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.

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Mr. Dickenson. We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. . . .

2 Farrand, p. 331 (emphasis added).

When the Convention debated the clause as finally enacted, one delegate initially thought that the clause might merely restate the general principle that the states retain whatever power the federal government lacks:

> Mr. Sherman moved to strike out the last member - "and authority of training &c.["] He thought it unnecessary. The States will have this authority of course if not given up. Id., p. 385.

This unsuccessful motion was based on the same logic as the Montgomery Amendment and the Eighth Circuit's opinion, but carried that logic to its

proper conclusion: if Delegate Sherman's interpretation were correct, then the Militia Training Clause was meaningless and should have been stricken.[9/] Subsequent discussion

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9/ The District Court in Dukakis v. U.S. Dept. of Defense, 686 F. Supp. 30, 38 (D. Mass), aff'd 859 F.2d 1066 (1st Cir. 1988) (per curiam), cert. denied, 109 S. Ct. 1743 (1989), also attempted to find some residual meaning in the Militia Training Clause by stating that the clause leaves the authority over the militia to the states when the federal government decides not to exercise that authority. This is tantamount to saying that the Militia Clause is surplusage (and, as such, meaningless). The notion that the states retain whatever governmental powers the federal government declines to exercise is already inherent in our Constitution, which establishes the federal government as a government of limited powers, leaving all other powers to the states and the people. The Federalist No. 39 (Madison) (Mentor ed.), p. 245 (The federal government "cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other

(footnote continued)

not only pointed out the error in Delegate Sherman's initial view of the purpose of the clause, but actually convinced Sherman himself:

> Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.
>
> Mr. King, by way of explanation, said that by organizing the Committee meant, proportioning the officers & men - by arming, specifying the kind size and caliber of arms - & by disciplining prescribing the manual exercise evolutions &c.
>
> Mr. Sherman withdrew his motion.

Id. The limited scope of Congressional

(footnote continued)

objects."). The Federalist No. 45 (Madison). In addi- tion, it is not plausible that the framers were so inconsistent as to state this overriding tenet of federalism only in the Militia Training Clause, but not in other parts of Article I, § 8.

authority, as explained by delegate King, demonstrates that the Militia Clause was designed to restrict narrowly the federal government's ability to affect the training of the militia.

The purpose of the Militia Clause to establish a check upon the federal government and to preserve local influence over the militia became even clearer when the debate over the militia continued in the state ratification conventions. Despite his earlier, unsuccessful proposal for complete federal control over the militia,[10/] Alexander Hamilton acknowledged that the Convention's reservation of state control over the militia was a significant check upon the federal government:

10/ See 2 Farrand 293.

> What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have the sole and exclusive appointment of the officers? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

The Federalist No. 29 (Hamilton) (Mentor ed.), p. 186 (emphasis added in final sentence only). Of course, the intent to preserve states' "preponderating influence" over the actual operation of the militia is vitiated if the state-appointed officers are merely extensions of the federal government, no longer subject to state influence over

matters such as the schedule, location or purpose of training.

Given the composition of the citizen-army (militia), as well as the states' reserved powers over the militia, Hamilton ridiculed the notion that the federal government could send the militia (as opposed to the federal army) out of state in order to achieve goals that were abhorrent to the members of the militia themselves:

> If there should be an army to be made use of as the engine of despotism, what need of the militia? If there should be no army, whither would the militia, irritated at being required to undertake a distant and distressing expedition for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their course, but to the seat of the tyrants, who had meditated so foolish as well as so wicked a project to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people? Is this the way in which usurpers stride to dominion over a numerous and enlightened nation?

Id., p. 187.[11/] This argument would have been impossible if, as the Eighth Circuit believed, the federal government could use the Armies Clause at will to control the militia over the state's objection.

3. Prior to 1986, Congress Itself Acknowledged the States' Authority Over Peacetime Militia Training.

In the nearly 200 years prior to the Montgomery Amendment, four times Congress passed major legislation affecting the general organization and administration of the National Guard. None of these acts infringed upon the authority of the states to control the

11/ Likewise, Madison argued that the federal government would not "drag the militia unnecessarily to an immense distance . . . . This . . . would be unworthy of the most arbitrary despot," 3 J. Eliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, pp. 381-82.

peacetime training of the militia. Rather, Congress respected and endorsed the same limitations under the Militia Training Clause upon which Minnesota relies in this case.

For instance, in the Dick Act of 1903 (Act of Jan. 21, 1903, c. 196, 32 Stat. 775), it was only "on the request of the governor" that a state's militia could participate in the training given the regular army. 1903 Act, § 15, 32 Stat. 777-778. See also H.R. Rep. 1066, 82d Cong., 1st Sess., p. 5 (1951).

Similarly, in the National Defense Act of 1916 (Act of June 3, 1915, c. 134, 39 Stat. 166), Congress explicitly preserved certain state authority in National Guard matters, including in Section 61 of the Act, the "right of the States ... in the use of the National Guard within their respective borders in

time of peace ..." 39 Stat. 166 at 198. See also Section 107, 39 Stat. 209.

Even when the concept of dual federal and state enlistment (see below, pp. 34-48) was enacted by the National Defense Act of 1933, Act of June 15, 1933, c. 87, 48 Stat. 153, Congress respected state peacetime control of the militia. The only type of federal control envisioned by the Congress was the power to make the militia "immediately available" upon "the declaration of an emergency by Congress and without the necessity of draft legislation." S. Rep. No. 135, 73d Cong., 1st Sess., p. 2 (1933). "Pending the declaration of such an emergency, control of the Guard by the respective States is unaffected and in nowise impaired." Id. Absent declaration of an emergency, the President could order officers of the National Guard of the United States to

active duty only "with their consent." 1933 Act, §§ 4, 18; 48 Stat. 155, 160 (1933). The Act provided that "in time of peace, [the members of the National Guard] shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States." Id., § 5, 48 Stat. 156. The extent of -- and limits upon -- the changes made by the 1933 Act are well summarized in the Senate Report that accompanied the Act:

> "The changes proposed are simple. The bill proposes to make the National Guard of the United States a reserve component of the Army of the United States, so as to eliminate the delay incident to draft, leaving its control, officering, and discipline except when ordered out pursuant to an emergency declared by Congress, with the respective States, just as at present. The relation of the Guard to the respective States during peace is in nowise affected or altered." S. Rep. No. 133, 73d Cong., 1st Sess., p. 2 (1933) (emphasis added).

All that remained -- prior to the Montgomery Amendment -- was the codification of this implicit acknowledgement of state power over training. This codification occurred through the Armed Forces Reserve Act of 1951, provisions of which became 10 U.S.C. § 672(b), (d). This provision was enacted after Congress received the testimony of the President of the National Guard Association, who pointed out that a proposal for more complete "federalization" of the Guard would have unconstitutionally undermined the states' proper role in governing the militia, violating "article I, section 8, clause 16 ... which reserves to the States the appointment of officers and the authority of training the militia ..." Reserve Components: Hearings on H.R. 4860 before the House Committee on Armed

Services, 82d Cong., 1st Sess., p. 476 (1951). Such an arrangement would disrupt the basic constitutional principle that the Guard must be "responsive to the orders of the governor". Id. at 478.

The Subcommittee drafting this legislation apparently found his comments persuasive, for the final version of the 1952 Act included the explicit gubernatorial veto provisions of §§ 672(b), (d). The provisions thus codified what the Constitution requires, and what Congress had respected through the Acts of 1903, 1916, and 1933: that the individual states control peacetime training of the National Guard. To this day, this principle underlies other laws in addition to 10 U.S.C. § 672.12/

12/ See, e.g., 10 U.S.C. § 269(g) (requiring governor's consent before a

(footnote continued)

C. The United States Cannot Rely On the Dual Enlistment Concept to Justify Federal Training.

The United States has argued that what is forbidden by the Militia Training Clause is permitted by the Armies Clause, U.S. Const. art. I, § 8, cl. 14. The essence of this argument is that, because, under federal law, National Guard members must enlist in both the federal and state National Guard, the Federal Government may constitutionally rely upon the federal enlistment in order to issue the same

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(footnote continued)

member of the National Guard of the United States may be transferred to the Standby Reserve); 10 U.S.C. § 2238 (prohibiting relocation or withdrawal of units of the National Guard of the United States without the governor's consent); 32 U.S.C. § 104(c) (President may not make certain changes in a National Guard unit without the Governor's approval).

training orders to the militia that it could issue to the regular army.

This is truly a principle without limit. If the federal government can force state officers and employees to have federal status, and then use the federal status to avoid express constitutional limits on federal authority (as exemplified by militia training), then state sovereignty exists in name only. Cf. Hopkins Savings & Loan Association, supra.

The general language of the Armies Clause was never intended to authorize federal training of the militia. To do so would "displac[e] the explicit limitation on federal" authority stated in the Militia Training Clause. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 117-118 (1984) (construing Eleventh Amendment). This

cannot be the law. See id., pp. 109, n.17. ("Article III confers no jurisdiction on this Court to strip an explicit [provision] of the Constitution of its substantive meaning.").[13/]

1. Congress May Not Train The Militia Under The Army Clause.

The notion underlying the respondents' position appears to be that Congress could use the Armies Clause to train the militia itself. This requires a truly radical departure from established principles of constitutional construction. It requires the Court to rule that one clause of the Constitution

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13/ In the context of this case, this argument does not implicate the validity of the entire dual enlistment scheme. The only question presented is whether, as applied to an area where the Constitution expressly reserves state power, namely militia training, the Federal Government's use of the Armies Clause to train the National Guard violates the Militia Training Clause.

authorizes something (federal authority over militia training) that another clause expressly prohibits.

The respondents' Armies Clause contention directly violates the rule that the powers granted to Congress "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." See Williams v. Rhodes, 393 U.S. 23, 29 (1968). This principle derives from the very nature of our Constitution. The document was intended to be read as a whole, without any contradictory or ineffectual provisions. Marbury v. Madison, supra.

This principle is also a matter of common sense. One would not expect the framers to adopt two incompatible clauses concerning authority over training the militia.

The violence done to the Constitutional structure by the Eighth Circuit's decision is all the more glaring for two reasons. First, Minnesota relies upon specific language governing authority over training the Guard (the Militia Training Clause). Even if one accepts the respondents' view of this case as involving an alleged conflict between constitutional provisions (rather than provisions governing the separate and distinct subjects of militia and army), it makes little sense to give primacy to the general language of the Armies Clause, which does not refer to the militia at all, let alone the authority of training the militia.

In addition, the Second Amendment insures the "continuation and render[s] possible the effectiveness of" the

militia as a check upon abuse of certain military powers by the federal government. See Miller, supra, 307 U.S. at 178. It limits the Army power, by freeing the militia from federal interference. See Note, Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters, 39 Case W. Res. L. Rev., p. 165, 174-177 (1988). Where express, constitutionally allocated powers over the militia are concerned, therefore, the Militia Training Clause, not the Army clause, has priority.

The federal government has correctly conceded elsewhere that its "conception of the dual-enlistment system makes the militia dependent upon Congress for its existence. . . ." Dukakis, supra, 686 F. Supp. at 36. This is fatally inconsistent with Miller, supra, the

Second Amendment and the principles set forth in the previous paragraph.

Nor does case law support the contention that the Armies Clause overrides the Militia Training Clause in a training context. All of the cases cited by the proponents of the dual enlistment justification depend upon the Selective Draft Law Cases, supra. But, in that 1918 case, the court did not pass upon the limited federalization of the Guard effected by the National Defense Act of 1916, let alone the dual status concept, which did not become law until 1933. Moreover, the facts of the case did not present issues regarding the training of the militia, and the Court did not consider any such issues.

This Court's more recent pronouncement on the organization of the National Guard appears in Maryland v.

United States, supra, 381 U.S. at 46-47 and n.8. That case cites the Militia Clause as the sole constitutional basis for the 1916 act, which, as the court noted, provides "the basic structure" for the present day National Guard. The Armies Clause was not mentioned at all. Most importantly, the Court stated that "Training, of course, was a duty reserved to the States by § 91 of the National Defense Act and by Art. I, § 8, cl. 16 of the Constitution." Id., 381 U.S. at 49, n.20. Far from authorizing federal training of the National Guard, this Court has thus recognized that the Constitution still reserves the authority of training the National Guard to the states.

2. The National Guard Of The United States Is Militia.

The District Court of Massachusetts has suggested, without deciding, that

the National Guard in its "federal status" may no longer be militia. Dukakis, supra, 686 F. Supp. at 36. For good reason, the federal government has never advanced this radical proposition. Resting a ruling on this suggestion would be an error of law.

Not only is this argument fully refuted by the objections that it makes the Militia Training Clause meaningless (see above, p. 20), and would amount to unlawful Congressional abolition of the militia (see above pp. 38-39); but the statutes do not support the notion that the members of the National Guard of the United States cease being the organized militia.

The relevant statute defines the organized militia broadly enough to

include the National Guard of the United States.[14/]

Neither the respondents nor the Eighth Circuit have pointed to a statute

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14/ The militia includes "all able-bodied males at least 17 years of age and . . . under 45 who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard." 10 U.S.C. § 311(a) (reference to certain persons between the ages of 35 and 65, omitted).

The militia consists of only two classes: the organized militia ("The National Guard and the Naval Militia") and the unorganized militia (all "members of the militia who are not members of the National Guard or the Naval Militia."). 10 U.S.C. § 311(b).

Members of the Army National Guard of the United States must also be "members" of the National Guard. 10 U.S.C. § 101(11). As members of the National Guard, they must be in the organized militia even when in their federal status, since they meet the definition of militia in § 311(a) and since, under § 311(b), the unorganized militia only consists of persons "who are not members of the National Guard or the Naval Militia." (emphasis added).

that strips the National Guard of its status as militia when serving as National Guard of the United States.[15/]

Even if Congress had provided for abolishing units of the militia when the National Guard is ordered to active federal duty, the Constitution would not allow Congress to exalt a change in the militia's title over substance."[W]hen

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15/ Any argument that such a provision is implicit would go beyond the provisions of 10 U.S.C. § 672(f) and raise serious constitutional problems under the Militia Training Clause. It is tantamount to asserting a Congressional power to abolish the militia, as the federal government conceded in the District Court in Dukakis, supra, 686 F. Supp. at 36. Such an argument would violate the rule that, in the absence of a clear statement of Congressional intent, statutes must be construed to avoid constitutional questions, particularly those that involve alleged limits on state sovereignty. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985); United States v. Bass, 404 U.S. 336, 349 (1971).

this second role -- the Guard as Reserves -- intentionally and effectively removes ultimate control of the Guard from the states, there is a problem. Cf. Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (War Powers do not take precedence over other constitutional rights); Ullman v. United States, 350 U.S. 422, 428 (1956) ('As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion'), reh'g denied, 351 U.S. 928." Hirsch, The Militia Clauses of the Constitution, 56 U. Cinn. L. Rev. 919, 962, n.199 (1988).[16/]

16/ See also Johnson v. Powell, 393 U.S. 920 (1968) (Douglas, J., in chambers) (denying stay of deportation of the National Guard due to mootness), stating that the use of the Guard as a federal reserve unit "play[s] loosely with the concept of 'militia' as used in the Constitution ...".

Where authority over training is concerned, the difference between the Army National Guard and the Army National Guard of the United States exists in name only. There is extensive, mandatory federal control over the National Guard, an identical membership in the federal and state Guard, and a federally imposed disability on the states from having troops other than the National Guard.17/

17/ Congress has provided that "In time of peace, a State ... may maintain no troops other than those of its National Guard and defense forces authorized by subsection (c)." 32 U.S.C. § 109(a). U.S. Const. art. 1, § 10, cl. 3. The defense forces are not militia within the meaning of the Constitution, for under § 109(c), they are not subject to a call to federal duty, as the militia must be under clauses 15 and 16. See also Maryland, supra. Thus, the only permitted militia is the National Guard.

By statute, this militia must be subject to federal control. The

(footnote continued)

Calling the militia a federal army does not make it so. Substance must prevail over formal labels in constitutional adjudication. See Wisconsin v. J.C. Penney Co., 311 U.S. 435, 443-445 (1940). See also, Federal Housing Administration v. The Darlington, Inc.,

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(footnote continued)

National Guard is defined as the Army National Guard and the Air National Guard. § 10 U.S.C. 101(9); 32 U.S.C. § 101(4). The Army and Air National Guard are each defined as the land and air force, respectively that:

> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution,
>
> (C) is organized, armed and equipped wholly or partly at Federal expense; and
>
> (D) is federally recognized.

10 U.S.C. § 101(10), (12); 32 U.S.C. § 101(4), (6). Most significantly, enlistment or appointment as an officer in the Army National Guard is also, ipso facto, enlistment or appointment in the Army National Guard of the United

358 U.S. 84, 91 (1958). Just as the Federal Government could not call the militia into federal service for training without making the Militia Training Clause meaningless (see above, p. 20), so it cannot be permitted to use the Armies clause to nullify the militia's identity as a militia.

D. The Montgomery Amendment Does Not Fall Within Congress' Power to Prescribe Discipline.

In urging the constitutionality of the Montgomery Amendment, certain amici

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(footnote continued)

States, a Reserve component of the Army. 10 U.S.C. §§ 3261 (enlistments), 3351 (officers). Officers and enlisted personnel must be discharged from the National Guard if federal recognition is withdrawn. 32 U.S.C. §§ 322, 324. This occurs if the unit in which he serves loses its federal recognition or if he ceases to have the federally prescribed qualifications. 32 U.S.C. § 323. The so-called federal militia, the Army and Air National Guards of the United States, constitute reserve components, "all of whose members are members of the" appropriate state National Guard. 10 U.S.C. § 101(11), (13); 32 U.S.C. § 101(5), (7).

below (but, significantly, not the respondents) have relied upon Congress' power in clause 16 to prescribe "the discipline" according to which the states must conduct the training.

As the District Court held, A-152, n.9, the Montgomery Amendment does not, in fact, prescribe discipline for training to be conducted by the states. It concerns training by the federal government. Moreover, its purely negative command, addressed to state governors, prescribes no discipline whatsoever for training the National Guard. Its sole purpose and effect is to take the training out of the states' hands altogether, without the states' consent.

Even if the Montgomery Amendment purported to prescribe discipline and even if it applied to training by the

states, it would exceed Congress' constitutional authority. The "discipline" clause concerns a narrow area of regulation involving obedience to regulations and orders as well as performance of field exercises and drills,[18/] or, in the words of Convention delegate King, "the manual exercise evolutions &c." 2 Farrand 385. See also H.R. Rep. No. 1094, 57th Cong., 1st Sess. 19 (1902). This does not extend to specifying, for instance, the location of training. Congress' power to prescribe a uniform discipline[19/] for training was designed so that the Guard would understand

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18/ See 32 U.S.C. §§ 501-507 (prescribing certain field exercises, drills, schools, competitions, instructions and other discipline for state National Guard units).

19/ In the Constitutional Convention, General Pinckney referred to "serious mischiefs" caused by "a dissimiliarity in the militia" and urged that

(footnote continued)

Federal orders and authority, so as to function harmoniously with federal forces when and if called into federal service in the future.

Since the Montgomery Amendment cannot be construed as prescribing the "discipline" for training by the states, but rather, purports to allow the federal executive to exercise the authority over training the militia, it is an invalid usurpation of state power.

E. The Defendants' Policy Concerns Are Exaggerated And Provide No Basis For Altering The Constitution.

The respondents have asserted two policy concerns that, they claim, should

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(footnote continued)

"[u]niformity was essential," 2 Farrand 330. The discipline, thus, referred to the general principles that enable units of the militia to comprehend and respond to orders from federal officers. This is vastly different from ordering the militia for training overseas as an instrument of federal foreign policy.

influence the Court's interpretation of the Constitution. First, they emphasize the importance of training. Second, they assert that the training of the National Guard (in its federal status) should be an instrument of national foreign policy, with which the states should not interfere.

The importance of training is obvious. This cuts in favor of the petitioners' position in this case, not the respondents'. One would not expect a state to object to training as such:

> The States are interested in the safety of the United States, the strength of its military forces, and its readiness to defend them in war and against every attack of public enemies . . . . Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States Army or in state militia . . . .

Hamilton, supra, 293 U.S. at 260. See also, Gilbert v. State of Minnesota, 254 U.S. 325, 329 (1920). The respondents' arguments about the benefits of training are, therefore, largely a non-issue. See A-117 to 120.

The respondents' true emphasis below was on the use of militia training not solely for training, but for foreign policy purposes. This concern is exaggerated. The respondents have many options other than the use of a particular state's National Guard training in peacetime for foreign policy purposes.

Operational missions are authorized by 10 U.S.C. § 673b without the Governor's consent. This statute permits achievement of foreign policy, but only if the policy is not disguised as training, for the statute includes the proviso, "other than for training." Id.

Moreover, even when the federal government claims to be doing nothing more than training, and one state withholds consent, the federal government will often be able to effect its intended purpose by finding another state that will consent, as the debates over the Montgomery Amendment illustrate:

> In the case of [Maine], the 48 positions that were requested but denied by our Governor were quickly filled with guardsmen from the 11 other States participating in the maneuvers. While the construction project for which these guardsmen were requested would have provided valuable training experience, the participation of the Maine Army National Guard was not required to complete the project, nor did this project present the only opportunity the Maine Guardsmen would have to obtain this type of training.

132 Cong. Rec. H-6265 (daily ed.) (Aug. 14, 1986) (Remarks of Rep. McKernan of Maine). The respondents have not pointed to a single instance, since 1951, in which they have been unable to

carry out their foreign policy because of any governor's objection. Indeed, they point to no such instance in the 199 years preceding passage of the Montgomery Amendment. Their policy concerns are thus as insubstantial as they are inconsistent with the Militia Training Clause.[20/]

The final response to the defendants' alleged policy concerns is the simplest. The issue was resolved over 200 years ago. The Constitution provides that militia training is <u>not</u> an instrument of federal foreign policy, unless, of course, the states consent. Since the Constitution grants authority to the state over training the militia, the federal government's disagreement,

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20/ Concerns over the adequacy of National Guard training are misplaced for similar reasons. <u>See</u> A-49 to 61 (Heaney, S.C.J., dissenting).

on policy grounds, with the constitutional choice is irrelevant.

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government . . . .

Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944 (1983). See also Pennhurst, supra, 465 U.S. at 123.

F. Alternatively, the Statute Should Be Construed As Requiring a Federal Declaration of Exigency or Emergency In Order to Render it Constitutional.

The serious Constitutional issues raised by the enactment of 10 U.S.C. § 672(f) should result in invalidation of the statute, as urged by Minnesota. Alternatively, the statute must be construed in order to avoid the constitutional question by holding that, if the

Governor objects to federal training of the National Guard, the executive or Congress must declare a national emergency before overriding the Governor's objection pursuant to § 672(f).

This Court's long standing practice is that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979), citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804). In cases raising serious doubt of a statute's constitutionality, the Court has required that "the affirmative intention of the Congress [be] clearly expressed" before construing the statute in a manner that raises such doubts. Id., quoting Benz

v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957). This approach is not only well grounded in precedent, but has the virtue of being "a less intrusive way [than invalidation] of vindicating norms that do in fact have constitutional status." Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev., 405, 469 (1989).

The requirement of a clear Congressional statement is doubly applicable here. This case involves an asserted intrusion into the constitutionally reserved state authority over training the militia. This Court repeatedly has held that Congress must speak clearly if and when it intends to interfere with state interests or to abrogate rights that states enjoy under the Constitution. E.g., Puerto Rico

Department of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1355 (1988) ("a 'clear and manifest purpose' of preemption is always required.").[21/]

Congress has not clearly stated its alleged intent to allow federal militia training without the constitutionally required declaration of exigency. In 10 U.S.C. § 672(f), it limited the grounds upon which a Governor may withhold consent to federal orders for active duty of the National Guard. It did not, however, purport to remove constitutional

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21/ See also Atascadero State Hospital, supra, 473 U.S. at 242 (Congress may abrogate the states' immunity from suit in federal court "only by making its intention unmistakably clear in the language of the statute."); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) (Congress must "unambiguously" express its intent to impose conditions on states pursuant to federal grants); Bass, supra, 404 U.S. at 349 (federal criminal statute construed narrowly so as not to preempt state statute criminalizing same conduct).

limitations upon the federal government in exercising authority over training the militia. In fact, it was silent on what procedure or declarations must follow if a Governor attempts to oppose federal orders to active duty for the purpose of training the National Guard.[22/]

Minnesota and the dissenting opinion below (A-40 to 42) have argued persuasively that, if the federal government wishes to assume authority over the militia on the facts of this case, it must declare a national emergency or exigency. This requirement derives from

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22/ This is not surprising, since there was exceedingly little debate on the amendment itself, which was introduced as a floor amendment, upon which debate was limited to 10 minutes. See 132 Cong. Rec. H-6264 (daily ed.) (Aug. 14, 1986).

the discussions of the exigency requirement by the framers (e.g. The Federalist No. 23 (Hamilton), p. 153 (Mentor Ed.), (referring to "national exigencies"), as well as the case law (see Selective Draft Law Cases, supra 245 U.S. at 382-383 (discussion of "exigencies" and "necessities" requiring use of Armies Clause powers). See also U.S. Const., art. 8, § 1, cl. 15. The declaration of an exigency is not subject to court challenge, see Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827), but serves the important purpose of assuring the accountability of the official who declares the emergency.

Though not mentioned in § 672(f) or the legislative debate on that section, the exigency requirement coincides with several indicia of legislative intent. As argued above, pp. 28-33, Congress

had always respected state control over the peacetime training of the militia in the absence of a declaration of exigency, at least until 1986. In the absence of a clear statement, it would be illogical to assume that Congress meant to delete the well-established declaration requirement without saying so in the statute or the legislative history. Moreover, the requirement of a declaration meets all the policy objections raised by the respondents and discussed above, pp. 51-56.

In short, if § 672(f) is held to be constitutional, the Court must construe the statutory scheme as preserving the Constitutional requirement that the Federal Government declare a national exigency before overriding a Governor's objection to federal orders for training the National Guard.

CONCLUSION

The judgment of the Eighth Circuit should be reversed and remanded with instructions to render a declaration that 10 U.S.C. § 672(f) violates the Militia Training Clause as applied to training of the National Guard.

Respectfully submitted,

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